No. 44837-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ANTHONY R. MILLER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 12-1-00497-8

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. In this case, during a recess held prior to jury selection, the trial court judge was informed by the bailiff that a potential member of the jury venire happened to be present in the courtroom prior to the start of jury selection. During the time that the potential venire member was in the courtroom, the parties and the court had discussed sensitive evidentiary matters about the case. In response, the judge then made a decision to excuse the potential juror, and someone then told the potential juror that she was excused. After the recess, the judge then in the open courtroom informed the parties and the public about what had occurred during the recess. *Do these facts indicate a violation of Miller's right to an open and public trial?*

2. Because his presence would have useless in regard to the facts at issue in this case, *Miller's right to be present was not offended in this case.*

B. FACTS AND STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts Miller's recitation of the procedural history and facts for the purposes of the issues raised on appeal, except that the State supplements with the following additional facts as needed to form the State's arguments:

On the morning of trial, while the defendant was in open court, the parties addressed preliminary matters prior to voir dire while the potential jury venire was being assembled elsewhere. RP 44-51; CP 83. These preliminary matters included the following discussions: whether potential

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witnesses would be allowed to sit in the courtroom during voir dire (RP 44); the issue of security in the courtroom (RP 44-45); the expected length of the trial (RP 45-46); the witness list (RP 46); whether to ask the jury if they were aware of any media coverage of the case (RP 47); whether, or how, to ask the jury if any of them had strong feelings about drugs or drug use (RP 47-48); and, whether, or how, to ask the jury if any of them had difficulty with viewing gruesome autopsy photos (RP 48-50).

The trial court then engaged in the following colloquy:

> THE COURT: ...
>
> We indicated earlier that we would be selecting 14 jurors. When the jury panel comes up for the voir dire, I will be putting14 up here, and then seating them on the rows out to the chairs. I believe we have a sufficient number of jurors, and I will ask the clerk now, do we have our cross offs on the list? Have been handed that? My list doesn't have them.
>
> COURT CLERK: She doesn't have them yet. Apparently there are still a few stragglers still coming in.
>
> THE COURT: Okay. Did she indicate how long she would be before --
>
> COURT CLERK: She gave them five minutes about three minutes ago, so hopefully within a couple of minutes.
>
> THE COURT: All right.
>
> MR. DORCY: We're waiting for the cross-offs to come?

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THE COURT: Yes. Apparently there was a couple more people that did appear. So at this point then I guess the best of time is I will go ahead then and step down. We will be in recess.

RP 50-51. The recess commenced at 10:03 a.m. CP 83. Approximately fifteen minutes later, at approximately 10:18, court then recommenced, and the following exchange occurred:

THE COURT: We now have our list of the jurors that did not appear. So please go ahead.

JURY MANAGER: Number 7, Prader.

MR. FOLEY: 7?

JURY MANAGER: Yes. 15, Peterson; 28, Havner; 34, Elkins; 38, Hinesman; 44, Watson; 47, Churchill; 54, 58, Hanson; 64, Brown; 66, Beede; 67, Rice; 72, Beckman; 76, Dale; 79, Langdon. And then we have two add-ons, number 85, Kerr, and 86, Martin.

THE COURT: Also there was an individual who was present apparently in the courtroom here when we began these proceedings who was a prospective juror. And we have --

JURY MANAGER: That's number 28.

THE COURT: -- because was present during those proceedings, when she should not have been there, but down with the rest of the jurors, we've gone ahead and excused her. And that's number 28.

JURY MANAGER: Number 28.

THE COURT: All right, thank you. Do the parties have any objection to the Court excusing -- having to excuse juror 28 for being involved?

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MR. DORCY: No. And in fact we were advised that that had happened, and counsel and I both agreed and stipulated that that --

THE COURT: Thank you.

MR. DORCY: She should be excused.

THE COURT: Yes.

MR. DORCY: I -- I can speak for me. I think that's accurate.

THE COURT: Mr. Foley.

MR. FOLEY: Yes.

THE COURT: Okay, all right. Then with that, is there anything else that we need to address before we bring in our jury?

RP 51-52. After Juror No. 28, who at that point was a potential member of the venire, was dismissed on the record, the trial court then swore in the venire, and voir dire began. RP 54.

C. ARGUMENT

1. In this case, during a recess held prior to jury selection, the trial court judge was informed by the bailiff that a potential member of the jury venire happened to be present in the courtroom prior to the start of jury selection. During the time that the potential venire member was in the courtroom, the parties and the court had discussed sensitive evidentiary matters about the case. In response, the judge then made a decision to excuse the potential juror, and someone then

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told the potential juror that she was excused. After the recess, the judge then in the open courtroom informed the parties and the public about what had occurred during the recess. *Do these facts indicate a violation of Miller's right to an open and public trial?*

a) Standard of Review

Whether a defendant's right to an open trial has been violated is a question of law that is reviewed de novo on appeal. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012).

b) Irrespective of any agreement or objection by any party, on the facts of this case the trial judge was required by RCW 2.36.110 to dismiss Juror No. 28, and the mere fact that the judge's decision to dismiss the juror was communicated first to the juror during a recess before it was communicated to the parties and public in open court does not, under the experience and logic test, indicate a violation of Miller's right to an open and public trial.

The State contends that the record does not support an argument that the trial court judge had any direct contact with Juror No. 28; nor does the record support an argument that the trial judge did not have contact with Juror No. 28. Furthermore, there is nothing in the record to indicate that the trial judge or anyone acting on behalf of the trial court did, or did not, have any discussion with Juror No. 28 about what she might have been exposed to while sitting in the courtroom during motions in limine.

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The State contends that the trial judge's choice of words suggests that she was informed by the bailiff that Juror No. 28 was in the courtroom during pre-voir dire motions and that the judge responded by telling the bailiff to excuse the juror. When informing the parties of what had occured, the judge said "there was an individual who was present *apparently* in the courtroom here when we began these proceedings who was a prospective juror...." RP 51 (emphasis added). The trial judge's use of the word "apparently" indicates that she had not discussed the matter with the juror or otherwise engaged in any fact finding outside of the courtroom. The trial judge concluded by saying, "*we've* gone ahead and excused her." RP 51 (emphasis added). The State contends that the trial judge's use of the plural, we, indicates that the judge informed the bailiff to excuse the juror.

The State contends that nothing of substance occurred outside the open courtroom or outside of the presence of the defendant. Essentially, there are only three things that did occur outside of the open court: 1) the bailiff informed the judge that Juror No. 28 had been in the courtroom during the pre-voir dire discussions of the proffered evidence; 2) the judge decided to excuse the juror; and, 3) the juror was informed that she was excused.

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Our Supreme Court has identified the experience and logic test as the test to use to determine whether a closure of the courtroom has occurred. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). "The experience and logic test can be helpful in that it allows the determining court to consider the actual proceeding at issue for what it is...." *Id.*

Under the experience and logic test, whether a closure occurs depends upon: 1) '"whether the place and process have historically been open to the press and general public'"; and, 2) '"whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.*, quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 93 L.Ed.2d 1 (1986). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." *Sublett* at 71. In the instant case, there was no interaction between the court, counsel and the defendant outside of the open court. Instead, the only interaction that occurred was *apparently* between the court and the bailiff and between the bailiff and the juror.

i) Did an open court violation occur when the bailiff told the judge that Juror No. 28 had been in the courtroom during pre-voir dire discussions?

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In the case of *State v. Moore*, 38 Wn.2d 118, 228 P.2d 137 (1951), an impaneled jury asked the bailiff for a magnifying glass. Our Supreme Court commented on this request as follows: "Of course, such a request by the jury should have been by the bailiff conveyed to the judge for appropriate instructions." *Id.* at 126. No authority was located to suggest that pre-voir dire communications by a bailiff to a judge about a member of the venire, such as what occurred on the facts of the instant case, have historically been open to the press and public.

Still more, there is nothing to suggest that public access would provide any positive influence on the facts of the instant case. The case of *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997), was concerned with an improper communication between an impaneled jury and a bailiff, whereas at issue in the instant case is a pre-voir dire communication between a bailiff and the trial judge about a potential member of the venire. So, while the facts and issue of *Bourgeois* are distinct from those of the instant case, the following language from Bourgeois is nonetheless instructive in the instant case:

> The bailiff is in a sense the "alter-ego" of the judge, and is therefore bound by the same constraints. *See O'Brien v. City of Seattle,* 52 Wash.2d 543, 547–48, 327 P.2d 433 (1958). When an ex parte communication takes place that relates to an aspect of the trial, the trial judge "generally should disclose the communication

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> to counsel for all parties." *Rushen v. Spain,* 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983).

State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997).

Here, the bailiff communicated to the trial judge that a potential member of the venire had been in the courtroom while pretrial evidentiary matters were being discussed. RP 51-52. The State contends that public or press involvement in this process would not benefit this process in any way. Still more, the judge at first opportunity put this information on the record in the open courtroom in the presence of all parties, including the defendant. RP 51-52.

Thus, neither prong of the logic and experience test were offended on these facts. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The State contends that as the judge's alter ego, the bailiff was in charge of the venire, and no closure of the courtroom occurred when during a recess the bailiff told the judge that a member of the venire had been present in the courtroom during discussions about the case.

ii) Did an open court violation occur when the judge decided to excuse Juror No. 28?

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There is no citation to the record where it can be surmised that the trial judge interacted with anyone, or undertook any action to investigate, or that the trial judge did anything at all except to make a decision, which was to excuse Juror No. 28 and to then communicate that decision to the juror, probably by dispatching the bailiff. RP 51-52.

The State contends that the judge's process of making this decision was a private exercise in thought. Generally, a judge's thought processes have not historically been open to the press and general public, or at least not contemporaneously with the decision. Judges often reduce their thoughts to writing or provide an oral ruling in a case, which are eventually open to the press and public, but the process of reaching any decision is generally done privately and preliminarily to the public explanation of the decision.

This process was followed in the instant case. During a recess the judge made a private decision, and when the recess was over, the judge publicly informed the parties and made a record of the decision. RP 51-52. The State contends that on these facts neither prong of the experience and logic test supports a conclusion that the judge's act of making a private decision, prior to openly expressing that decision in the open

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courtroom, constitutes a closure of the courtroom. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012).

iii) Did an open court violation occur when Juror No. 28 was informed that she was excused?

As argued previously, the record is unclear as to exactly how Juror No. 28 was informed that she was excused. RP 51-52. It appears, however, that the judge told the bailiff to excuse the juror. RP 51-52. As argued previously, regardless of how the potential juror was informed that she was excused, the record suggests that there was no discussion with the juror, that no facts or evidence were taken, and that after the judge had made a unilateral, private decision to excuse the potential juror, she was simply told that she was excused. RP 51-52.

In the case of *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013), the Court found that the bailiff's excusal of two sick jurors was an administrative act that did not offend defendant's right to an open trial. In the instant case, the State wishes to draw a distinction between the act of communicating the judge's decision to the juror and the formal, official act of actually excusing the juror. RP 51-52. The State's argument is that the mere act of communicating to Juror No. 28 that she was excused was

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an administrative act, while the formal, official act of excusing Juror No. 28, regardless whether this act was administrative or substantive, occurred in the instant case in the open courtroom. And because the formal, official act of excusing Juror No. 28 occurred in open court, this act did not offend Miller's right to an open and public trial.

After the short recess, during which someone had informed Juror No. 28 that she was excused, the trial judge went onto the record in the open courtroom and told the parties what had occurred. RP 51-52. Apparently, someone had informed the parties beforehand, and the parties were expecting the judge's comment, which is apparent from the prosecutor's comment that "in fact we were advised that that had happened, and counsel and I both agreed and stipulated that that... [s]he should be excused." RP 52. The trial court asked whether either party had any objection to the excusal of the juror. RP 52. Neither party objected. RP 52.

The State contends, as argument, that there would have been no point in soliciting objections unless the trial court was prepared to bring the juror back into the courtroom to hold a hearing in the event that there was an objection. The trial court had, whether directly or through the bailiff, pre-informed the juror that she was excused, but the official,

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formal act of excusing the juror did not occur until the judge called for objections in the open courtroom and until there were no objections raised, after which the judge then declared: "Okay, all right. Then with that, is there anything else that we need to address before we bring in the jury?" RP 52.

No authority was located to suggest that the act of merely informing a juror about the fact that she was being excused by the trial court is an act for which "the place and process have historically been open to the press and general public[,]" as expressed by the first prong of the experience and logic test, which was recently reaffirmed by *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). Still more, it is not probable that "public access" would play "a significant positive role in the functioning of the particular process in question." *Id.* This is so because on the facts of this case, the only process at issue is that the juror was told, by someone, that she was excused, and it appears that this simple act of communicating this fact to the juror is all that occurred outside the courtroom. RP 51-52.

c) Application of RCW 2.36.110 to the facts of the instant case, and summation of the State's argument that under the experience and logic test there was no open courts violation in this case.

Because no hearing was held and nothing of substance occurred outside the courtroom. What did occur outside of the courtroom was nothing more than the bailiff's report to the judge, the judge's mental processes in the form of a solitary, private decision, and the communication of that decision to the juror. Thus, what occurred here was not a constitutional violation of Miller's right to an open trial, but was instead a statutory requirement of RCW 2.36.110, which reads as follows:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110.

In words of command, RCW 2.36.110 removes any discretion from the trial judge, other than to form an opinion, and *requires* the trial judge to excuse any juror "who in the opinion of the judge, has manifested unfitness as a juror by reason of bias... or practices incompatible with proper and efficient jury service." The language of RCW 2.36.110 does not by its terms expressly require a hearing.

No hearing was held in this case. RP 51-52. Instead, the judge privately formed an opinion based upon the fact that the juror, rather than assembling in the jury room with other members of the potential venire,

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had entered and remained in the courtroom and was present in the courtroom during pretrial discussions about sensitive evidentiary issues. RP 44-50, 51-52. If a hearing is held to determine facts preliminary to a challenge for cause, which would be voir dire, then in such a case the State agrees that the hearing, or voir dire, implicates the defendant's right to an open and pubic trial, but the actual challenge is "solely a legal issue" that does not implicate the right to an open trial. *State v. Love*, ___ Wn. App. ___, 309 P.3d 1209 (No. 30809-0-III (para. 14), Sep. 24, 2013).

The judge's act of forming an opinion and reaching a decision based on that opinion is necessarily a private act. Other than thinking out loud, there is no means by which the judge may involve the public in that process. But the judge did involve the public in the process, and she did so by going into the open courtroom and, on the record, informing the public and the parties about the decision that she had made -- to excuse Juror No. 28. RP 51-52. As in *Sublett*, the court "created a public record that furthered the public trial right." *Love* at para. 16, citing *State v. Sublett*, 176 Wn.2d 58, 77, 292 P.3d 715 (2012). The judge's decision was communicated to the juror before it was communicated to the parties and the public, but as argued above, the judge's act of merely informing the juror of a decision that had already been made was an

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administrative act that did not require public involvement. *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013).

It appears from the record that Juror No. 28 was never questioned about what she might have overheard or whether she was actually biased because of what she overheard. RP 51-52. On one hand, it might be presumed that Juror No. 28 was excused because the parties and the court perceived her as potentially biased by what she may have overheard in the courtroom and because they were concerned with the risk that she might taint the remainder of the potential venire. But there is no *manifest* bias in this case. The bias was not manifest because there was no hearing on the matter because no party objected to, and the parties apparently stipulated and agreed with, the court's decision to excuse the juror. RP 51-52. As argued previously, had any party objected, presumably the court could have called the juror back and held a hearing.

On the other hand, however, what is manifest is that Juror No. 28 --- apparently unaware of any prohibition against doing so --- had entered and remained in the courtroom during discussions between the court and the parties regarding sensitive evidentiary matters. RP 51-52. This circumstance manifests a practice that is incompatible with proper and efficient jury service. Sequestering the potential members of the venire in

the jury room prior to voir dire *is* a practice that is compatible with proper and efficient jury service, because such a practice assures that potential members of the venire are not improperly influenced by exposure to sensitive matters that are discussed in the courtroom (such as the risk that they might see the defendant in shackles, or that the venire might be informed of unduly prejudicial evidence that the court had, or would latter, suppress or exclude, or other sensitive matters). The failure to sequester potential members of the venire under such circumstances, however, *is not* a practice that is compatible with proper and efficient jury service.

In conclusion, what occurred here was not a violation of Miller's right to an open and public trial. Instead, what occurred is that, in order to preserve Miller's right to an untainted jury, the trial judge dutifully complied with the mandate of RCW 2.36.110 and dismissed a potential member of the venire, Juror No. 28, because she had inadvertently remained in the courtroom during pretrial hearings while sensitive evidentiary issues were discussed. Had the trial court judge gone into the courtroom and informed the parties of her decision, *before* this information had been communicated to the juror, and had the judge then dispatched the bailiff to go and inform the juror about the decision, *after* the judge had informed the parties and public in open court, then probably

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no open courts violation would be questioned. The State contends that the mere fact that the judge communicated the decision to the juror *before* informing the public and the parties should not convert these circumstances into an open courts violation.

2. Because his presence would have useless in regard to the facts at issue in this case, *Miller's right to be present was not offended in this case.*

a) Standard of Review

Whether a defendant's constitutional right to be present is violated in a particular case is reviewed de novo on appeal. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013).

b) Because Miller's presence would not have been useful in regard to the facts at issue in this case, his right to be present was not offended.

Initially, Miller should not be permitted to raise this issue for the first time on appeal, because he did not object in the trial court and he has not shown that there was manifest constitutional error that was manifest in the sense that it actually prejudiced him. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

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As argued in section one, above, the record does not suggest that Juror No. 28 was ever questioned by anyone in regard to what she might have heard in the courtroom or in regard to what effect that information may have had on her ability to be fair and impartial. Instead, as argued in section one above, at issue are essentially three acts or events that occurred in the trial court: 1) the bailiff reported to the judge that potential Juror No. 28 had been sitting in the courtroom during a pre-voir dire hearing; 2) the judge decided to excuse Juror No. 28; and, someone told Juror No. 28 that she was excused.

In none of these three circumstances would Miller's presence have been useful; nor did his absence in any way thwart his ability to obtain a fair and just hearing. The recent case of *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013), explained the right to be present, as follows:

> " '[T]he presence of a defendant is a condition of due process *to the extent that a fair and just hearing would be thwarted by his absence.*' " *Irby,* 170 Wash.2d at 881, 246 P.3d 796 (emphasis added) (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105–07, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). Therefore, a defendant has the right to be present " 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' " *Irby,* 170 Wash.2d at 881, 246 P.3d 796 (quoting *Snyder,* 291 U.S. at 105–06, 54 S.Ct. 330). But he "does not have a right to be present *when his ... 'presence would be useless, or the benefit but a shadow.'* " *Irby,* 170 Wash.2d at 881, 246 P.3d 796 (emphasis added) (quoting *Snyder,* 291 U.S. at 106–07, 54 S.Ct. 330).

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Wilson at 347-48.

First, as argued in section one, above, the actual, formal dismissal of Juror No. 28 occurred in open court with Miller present. RP 51-52. Miller had the opportunity to object, but he did not object. RP 51-52. Instead, the record suggests that Miller stipulated and agreed to the dismissal of Juror No. 28. RP 52.

Miller's presence during the events that led up to the courtroom action would have been useless. Miller has not shown that his presence would have born "any '"relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge"' or '"that a fair and just hearing would be thwarted by his absence."'" *State v. Wilson*, 174 Wn. App. 328, 350, 298 P.3d 148 (2013), quoting *Irby,* 170 Wn.2d at 881, 246 P.3d 796 (quoting *Snyder,* 291 U.S. at 105–08, 54 S.Ct. 330). Miller's presence would have had no effect when the bailiff made a report to the judge; likewise, his presence would have been but a useless shadow while the judge engaged in the private mental process of making a decision based upon the report that was made to her by the bailiff; and, Miller's presence would have had no useful effect when the judge's decision was communicated to the juror.

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As argued in section one, above, RCW 2.36.110 required the judge to dismiss Juror No. 28. The substance of the act of dismissal occurred in the open courtroom in the presence of the public, the attorneys, and Miller. RP 51-52. The trial judge had no discretion and was, by statute, required to dismiss Juror No. 28 once the judge had formed the opinion that the potential juror had "manifested unfitness as a juror by reason of ... conduct or practices incompatible with proper and efficient jury service." RCW 2.36.110. The record is quiet on this point because Miller specifically did not object to the trial judge's dismissal of Juror No. 28. RP 51-52.

But Miller had an opportunity to influence the judge's opinion. RP 51-52. When the trial court solicited objections, Miller had an opportunity to state an objection and to argue his point and, if he chose, to ask that the juror be examined or that some other action be taken to explore the issue. RP 51-52. But Miller did not object. RP 51-52. Instead, the record suggests that he stipulated and agreed to the dismissal of Juror No. 28. RP 52.

In conclusion, although the State contends that no error occurred here, a violation of the right to be present at trial is nonetheless subject to harmless error analysis. *State v. Irby*, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011); *State v. Burdette*, ___ Wn. App. ___, 313 P.3d 1235, 1244

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(No. 42520-3-II, para. 37; Dec. 3, 2013). The State bears the burden of proving harmless error beyond a reasonable doubt. *Id.*

The facts of this case show that Miller suffered no prejudice. Even if Miller had been present when the bailiff told the judge that Juror No. 28 had been in the courtroom, Miller would have been powerless to alter this report. Had he been present when the judge considered the information and reached a decision to excuse the juror, he would have been powerless to have to have altered the judge's silent, private thought processes. If he had been present when the juror was informed that she was excused, Miller would have been powerless to alter the substance of that message. Finally, Miller was present in the open courtroom when the judge made a record of what had occurred, and Miller not only did not object, but also did not dispute that he stipulated and agreed that the juror should be dismissed. RP 52. On these facts, the State contends, it is proved beyond a reasonable doubt that Miller did not suffer prejudice.

D. CONCLUSION

No action or event of substance occurred outside of the open courtroom or outside of the presence of the defendant in this case. The events at issue in this case are that the bailiff made a report to the judge

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about a potential juror, the judge made a private decision about the juror, and the judge's decision was communicated to the juror. Neither prong of the experience and logic test suggests that these acts may only be completed in open court. However, after the acts occurred, the judge went onto the record in open court and made a record of what had occurred, and the judge offered the parties the opportunity to object. Neither party objected.

On these facts Miller's right to an open and public trial was not offended. Finally, Miller's presence during the insubstantial out-of-court events would have been useless, and his right to present, therefore, also was not offended.

DATED: January 16, 2014.

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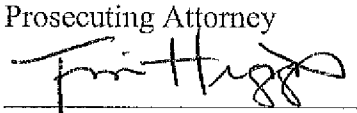
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

January 16, 2014 - 4:40 PM

Transmittal Letter

Document Uploaded: 448378-Respondent's Brief.pdf

Case Name: State v. Anthony Miller

Court of Appeals Case Number: 44837-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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